Supreme Court, U.S.
FILED

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No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

FLOYD THOMAS WEST,

Petitioner,

vs.

COUNTY OF KERN and
DEPUTY SHERIFF ROGER DIXON,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FIFTH APPELLATE DISTRICT

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QUESTION PRESENTED

In a civil rights case brought in state court pursuant to Title 42 United States Code Section 1983, alleging excessive force during the course of an arrest, where plaintiff obtained a $5,000 judgment against the county based on a state tort theory of battery against a deputy sheriff who was not a party at the time of trial, where the named officer was found not liable on a constitutional claim, and where the constitutional claim against the county was never reached, did the trial court err in denying attorney's fees and costs to plaintiff and granting costs to the county?

LIST OF ALL PARTIES TO THE PROCEEDING IN THE COURT OF APPEAL

Petitioner, Floyd Thomas West, is the only party seeking review of this Judgment. The caption of the case reflects all parties to the proceeding.

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FIFTH APPELLATE DISTRICT

OPINION BELOW

The opinion of the Court of Appeal of the State of California, Fifth Appellate District, affirming the Judgment of the Superior Court of Kern County is not published in the official reports, and is reproduced as Appendix A, infra, at A-1 - A-34.

The Order of the Supreme Court of the State of California, IN BANK, denying the petition for review is reproduced as Appendix B, infra, at B-1.

No opinion was rendered by the Superior Court of Kern County.

STATEMENT OF GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

The judgment of the Court of Appeal of the State of California, Fifth Appellate District, was entered on April 11, 1994. A timely Petition for Review was filed by Petitioner on May 23, 1994 with the Supreme Court of the State of California, and was denied on June 29, 1994. This Petition for a Writ of Certiorari is filed within 90 days of the date of said denial.

This Court's jurisdiction is invoked under 28 U.S. Code Section 1257(3).

FEDERAL QUESTION INVOLVED:

HOW DECISIONS OF THIS COURT, THE COURT OF APPEALS AND FEDERAL STATUTES WERE RAISED AND INTERPRETED BELOW:

A plaintiff in a civil rights case brought pursuant to 42 U.S. Code Sections 1983 and 1988 is a "prevailing party" for attorney's fees purposes if he succeeds on any significant issue in litigation which achieves some of the benefits he sought in bringing suit. Hensley v. Eckerhart, 461 U.S. 424, 433 (1983).

A plaintiff is a prevailing party in a civil rights case when he can show that there has been a "material alteration" of the legal relationship of the parties. Texas State Teachers Assoc. v. Garland Sch. Dist., 489 U.S. 782,792,793 (1989).

The purpose of Section 1988 is to ensure "effective access to the judicial process" for persons with civil rights grievances. H.R. Rep. No. 94-1558, p. 1 (1976). Accordingly, a prevailing plaintiff "'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.'" S. Rep. No. 94-1011, P. 4 (1976) (quoting Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 401 (1968).

> "[T]he proper focus is whether the plaintiff has been successful on the central issue as exhibited by the fact that he has acquired the primary relief sought." Taylor v. Sterrett, 640 F.2d 663, 669 (5th Cir. 1981).

FLOYD THOMAS WEST, Petitioner,

obtained a judgment against Respondent County of Kern in the Kern County Superior Court in the amount of $5,000.00.

The judgment was pursuant to a trial by jury of a civil rights action alleging police misconduct by the use of excessive force under color of state law, pursuant to Title 42, United States Code, Sections 1983 and 1988, as well as state tort claims, all arising out of the same set of facts; i.e., Mr. West's arrest in the early morning hours of August 17, 1986 by Kern County Deputy Sheriffs ROGER DIXON and FRANCIS KEVIN CRONIN, and the unlawful beating that he suffered during the course of that arrest. Since the incident, Mr. West has been certified as being totally disabled by the United States Social Security Agency.

The complaint also included a

Monell[1] Claim, alleging that the County of Kern established and adhered to a de facto policy of deliberate indifference to the use of excessive force by its sheriffs.

Prior to the trial, the County moved the court for an order severing the Monell claim from the claims against Dixon and Cronin, and for a separate trial of all non-Monell claims first, before the trial on the Monell Claim. The trial court granted this motion over petitioner's objection.

By the time of trial, Cronin had been dismissed, personally, from the action.

The jury determined that Dixon had not committed a constitutional violation

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1 Monell v. New York Dept. of Social Services, 436 U.S. 658 (1978)

against Mr. West, but that Cronin had committed a battery against him in the course of the arrest. The jury assessed damages in the sum of $5,000.00.

After the verdict was rendered, the County stipulated that Cronin was acting within the course and scope of his employment when he committed the battery against Tom West.

The trial court entered judgment against the County of Kern in favor of the petitioner in the amount of $5,000.00, plus his costs and disbursements.

But despite the entering of this judgment, the trial court also ordered that Dixon recover his costs and disbursements, which effectively offset any recovery Mr. West might receive on his judgment and costs.

After the trial concerning the acts of the officers, petitioner moved for an order setting a date for commencement of the separate trial on the Monell Claim against the County. The motion was denied.

Post-trial, petitioner timely moved for an order granting him attorney's fees and costs pursuant to Title 42, U.S. Code Section 1988. The request for fees and costs amounted to $202,799, representing legal work done by three law firms on behalf of Mr. West during the preceding five and one-half years.

Petitioner asserted in the trial court that he was entitled to an award of attorney's fees and costs because he was the prevailing party, pursuant to 42 U.S. code Section 1988, having succeeded on a

significant state law claim that was decided in preference to a non-frivolous federal constitutional claim that would warrant essentially the same type of relief as the state law claim, because it was based on the same legal theory, or core of common facts. (Citing Smith v. Robinson, 468 U.S. 992 (1984), and Maher v. Gagne, 448 U.S. 122 (1980), as well as Seals v. Quarterly County Court, etc. (6th Cir. 1977), 562 F.2d 390, and Carreras v. City of Anaheim (9th Cir. 1985), 768 F.2d 1039.

The trial court denied petitioner's motion for an award of attorney's fees and costs. It found that Dixon was the prevailing party!

STATEMENT OF THE CASE

Petitioner, FLOYD THOMAS WEST, brought suit against Kern County and two of its deputy sheriffs, alleging excessive force at the time of his arrest on August 17, 1986. He claimed that he was beaten so badly, without cause, that he suffered irreversible brain damage.

He was certified by the U.S. Social Security Department as totally disabled.

The complaint alleged violation of Mr. West's constitutional rights, under 42 U.S. Code Sections 1983 and 1988, as well as state torts, including assault, battery and false imprisonment. These charges were against Deputies Roger Dixon and Francis Kevin Cronin.

Petitioner also sued Kern County on

a Monell[2] theory, alleging that the County established and adhered to a de facto policy of deliberate indifference to brutality during arrests.

Prior to the trial, the trial court, over Mr. West's objection, granted the County's motion for a severance of the Monell claim against the County from the claims against Dixon and Cronin, and ordered that there would be a separate trial of all non-Monell claims prior to the trial of the Monell claims.

Three and a half years after the complaint was filed, and a year before trial, petitioner dismissed Cronin from the action. This dismissal by Mr. West's counsel, who was the second attorney to

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2 436 U.S. 658 (1978).

represent him, formalized the legal reality that Cronin could no longer be a defendant in the case, since Mr. West's first lawyer had apparently decided not to serve Cronin within the required three-year period since the filing of the complaint.

The jury found that Officer Dixon did not commit a constitutional violation upon Mr. West, but that Officer Cronin had committed a battery upon him.[3]

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3 Cronin, no longer a named defendant at the time of trial, could be found liable for a state tort, such as battery, which gave rise to County liability under the theory of respondeat superior. (Assuming, as was the case here, that when he committed the unlawful act, he was acting within the course and scope of his County employment.) But he could not be found liable for constitutional violations as an unnamed defendant, since Section 1983 violations do not give rise to respondeat superior theories of liability against governmental entities. Monell v. N.Y. Dept. Soc. Serv., 436 U.S. 658 (1978).

The jury assessed Mr. West's damages at $5,000.

Subsequent to the rendering of the verdict, the County stipulated that Cronin was acting within the course and scope of his employment when he committed the battery during Mr. West's arrest.

The trial court entered judgment against the County of Kern in favor of Tom West in the amount of $5,000, plus costs and disbursements. But it also ordered that Dixon recover his costs and disbursements, "subject to the provisions of Section 998 CCP, if applicable.[4]

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4 California Code of Civil Procedure, Section 998, deals with offers of compromise, and states, in pertinent part, that if an offer made by a defendant is not accepted, and the plaintiff fails to obtain a more favorable judgment, the plaintiff shall not recover costs, and shall pay the defendant's costs from the time of the offer, or the court may, in its discretion, require the plaintiff to pay all of the defendant's costs, as well as expert witness fees. In the case at

After the trial concerning the acts of the officers, Dixon and Cronin, the petitioner moved for an order setting a date for commencement of the separate trial on his Monell Claim. Mr. West argued that since he had proven that Officer Cronin violated his rights by committing an unlawful act against him in the course of an arrest, he had the right

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bench, the County made an offer of compromise to Mr. West in the sum of $50,000 to include all costs and attorney's fees. Petitioner did not accept the offer, and in argument to the court, pointed out that at the time the offer was made, he had incurred fees and costs in excess of the $50,000 offer, and therefore, his judgment of $5,000, plus his attorney's fees and costs, exceeded defendant's offer which insisted upon inclusion of all his fees and costs. He further asserted that he was the prevailing party, and thus, Section 1988 pre-empted state law even if CCP Section 998 applied, which it did not. The trial court appeared to be of the view that since it did not grant Mr. West's request for attorney's fees and costs, and thus did not shift those fees and costs from Mr. West to the County pursuant to Section 1988, then the fees and costs did not count in the Section 998 calculation, whether they were incurred or not. [RT 3/5/92, 24:17-19; 28:9-13.] "RT", and "A.A.", infra,

therefore to go forward against the County and prove that the de facto policy of the County in tolerating such unlawful conduct was responsible for the violation of his rights. He argued that the fact that the act committed against him was denoted as a "battery" rather than as a violation of his constitutional rights was irrelevant and the result of a technical pleading requirement; that a beating was a beating whatever the label, and that the only significant fact was that an unlawful act had been committed against him in the course of his arrest by an officer acting within the course and scope of his duties at the time.

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are abbreviations for Reporter's Transcript and Appellant's Appendix, which constitute the record on appeal. They are not included herein, in conformity with Rule 14.1(k) of the Rules of this Court, but will be forwarded to the Court promptly upon request.

The County argued that since the finding against Officer Cronin was a "battery" rather than being termed a constitutional violation, petitioner was precluded from pursuing his Monell Claim. Respondents argued also that the doctrine of res judicata precluded any further litigation, and that petitioner had recovered all of the damages that he was entitled to.

Mr. West asserted that in a second trial on the Monell claims, he would not be limited to the damages rendered in his favor in the first trial against Dixon, because if he proved an unconstitutional policy which condones unlawful behavior, he would be entitled to all of the damages he suffered as a result of that policy, not merely the single battery

attributed in the first trial to Officer Cronin. He argued, as he had concerning the structure of the verdict form, that it was probable that the jury would find that he had been severely injured, and now, in the second Monell phase, there would be no need for the jury to determine which officer was responsible for the serious injuries, as had been required by the verdict form in the first trial, and that therefore, in the trial against the County, he would recover for all the injuries he suffered, without the need to determine which injuries were caused by Dixon and which were caused by Cronin.[5]

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5 Petitioner objected to the structure of the verdict form in the trial court. The form required the jury to determine, on the one hand, whether Dixon had committed state torts, and, separately, on the other hand, whether Cronin had committed state torts. Mr. West urged that a

The trial court denied petitioner's motion to pursue his Monell Claim, without detailed discussion.

At the conclusion of the trial against the officers, Mr. West timely moved for an order granting him attorney's fees and costs pursuant to 42 U.S. Code Sections 1983 and 1988. (Please see Appendix C, attached hereto.) He requested a total of $202,799.09.[6] [A.A. 140-151; 187-199.]

Petitioner asserted in the trial court that he was entitled to an award of attorney's fees and costs because he was the prevailing party, pursuant to 42 U.S.

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further question should be put to the jury; i.e. whether Dixon or Cronin had committed a battery, or false imprisonment, in case the jury found that batteries, or other torts, had been committed, but that it could not be determined whether they had been committed by Dixon or Cronin.

6 The breakdown was as follows:

Code Sections 1983 and 1988, having succeeded on a significant state law claim that was decided in preference to a non-frivolous federal constitutional claim that would warrant essentially the same type of relief as the state law claim, because it was based on the same legal theory, or core of common facts.,

Attorney David E. Frank :- (based on a lodestar of 446 hrs. @ $200 p/h, with a multiplier of 2.0)	$178,400
Law Office if Richard E. Long :- (based on a lodestar of 47 hrs. @ $150 p/h)	$ 7,050
Attorney Michael J. Webb :- (based on a lodestar of 14.6 hrs. @ $175 p/h, with a multiplier of 2.0)	$ 5,110
Preparation of Fee Motion :- (Atty. Frank, 19.25 hrs. @ $200 p/h)	$ 3,850
Costs :-	$ 6,552.59

[A.A. 170-176; 196-199; 201-204]

(Present re-calculation indicates that the figure should be adjusted to $200,912.59.)

Citing Smith v. Robinson, 468 U.S. 992 (1984), and Maher v. Gagne, 448 U.S. 122 (1980). [A.A. 153-161 (154:12-19)];[RT 3/5/92, 14:7-23]; [AOB 7;ARB 4,5; PR 7-29 passim][7].

He also cited U.S. Court of Appeals holdings in Carreras v. City of Anaheim (9th Cir. 1985) 768 F.2d 1039, and Seals v. Quarterly Court, etc. (6th Cir. 1977 562 F.2d 394, both of which enunciated the basic principles established in Smith and Maher, supra, and were cited on appeal. [AOB 21; ARB 4; PR 21 Carreras); AOB 18,19,22,26; ARB 4; PR 18,19,22,26 (Seals).] He also cited the Congressional Record concerning the debates on The

7 The briefs on appeal are abbreviated as "AOB" (Appellant's Opening Brief),"ARB"(Appellant's Reply Brief) and "PR" (Petition for Review).

Attorney's Fees Award Act of 1976 (Section 1988). [AOB 12,14,15,20; PR 12,14, 15,20.] And of course Sections 1983 and 1988 were discussed throughout all papers and briefs.

The County argued in opposition that Mr. West was not the prevailing party, because Dixon was found not liable, Cronin was no longer a named defendant, the County had served petitioner with an offer to compromise pursuant to California Code of Civil Procedure Section 998 in the amount of $50,000, which had been rejected, and the verdict did not exceed the jurisdiction of the Municipal Court, pursuant to Code of Civil Procedure Section 1033(a).[8]

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8 Section 1033(a) of the California Code of Civil Procedure permits the court to award costs in its discretion where the prevailing party recovers a judgment that could have been rendered

Dixon argued that since he was the prevailing party, he should receive costs. He argued further that the judgment against Cronin did not make the County liable.

The County submitted an amended Memorandum of Costs, in the sum of $28,370.80, which included Dixon's costs. Petitioner moved to tax costs, asserting that simply because one of the officers, in this case Dixon, was found not liable, this did not entitle the County to its costs, where the plaintiff had prevailed on a principal point of his lawsuit, and had obtained a judgment against the County for the acts of one of the officers. He asserted also that the offer of compromise pursuant to Code of Civil Procedure

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in a court of lesser jurisdiction. (Petitioner's judgment of $5,000 could have been rendered in the Municipal Court.)

Section 998 was not dispositive, because the plaintiff's recovery, in combination with the costs and attorney's fees already incurred at the time the offer was made exceeded the $50,000 figure. He argued also that Code of Civil Procedure Section 1033(a) was not available to the County, since in a federal civil rights action, even though litigated in state court, Section 1988 pre-empts the California Code of Civil Procedure, and that federal civil rights law cannot be undermined by a state statute. [A.A. 130-135; 224-234]; [RT 3/5/92, 13:13 - 17:11].

At the conclusion of the arguments on March 5, 1992, concerning the motions for attorney's fees, costs, and the Monell Claim, the trial court stated:

"The Court did enter judgment on the verdict, and the judgment on

"the verdict says that the plaintiff is going to recover from the County of Kern a judgment in the sum of $5,000." [RT 3/5/92, 10:27 - 21:2].

The trial court stated further:

"Let me just confirm for the record that the judgment entered by the Court is in favor of plaintiff West against the County of Kern, and I'm relying upon that in making any rulings. That there is a judgment against the County of Kern, just so the record is clear." [RT 3/5/92, 25:13-17].

The judgment entered on the record states:

"Whereof, by virtue of the law, and by reason of the premises aforesaid, it is ordered, adjudged and decreed

"that said Plaintiff Floyd Thomas West have and recover from said defendant County of Kern judgment in the sum of Five thousand and no/00 ($5,000.00) plus his costs and disbursements incurred in this action, amounting to the sum of _____ Dollars." [A.A. 29].

Nevertheless, the trial court not only denied Mr. West's motion for the trial on the Monell Claim, but denied his motion for an award of attorney's fees and costs. The trial court found that Dixon was the prevailing party, and it granted his costs, which more than offset Mr. West's entire judgment. The court denied petitioner his costs based on Cal. Code Civ. Proc. §§ 998,1033(a) &

1033.5. [RT 3/5/92, 27:1 - 28:19]; [A.A. 235]. Section 1033.5 lists the types of costs that are recoverable under California law. All of Mr. West's claimed costs are listed within the statute.

While petitioner's motion for attorney's fees and costs was objected to by respondents as a matter of law, and was denied by the trial court, none of the respondents ever objected, alternatively, to any single item of fees or costs claimed in the motion as being unwarranted or excessive, nor did the court ever state that it was excercising its discretion in finding some item in the fee application as excessive or improper. As to attorney's fees, the trial court was distinctly <u>not</u> excercising its dis-

cretion, but was ruling on what it regarded as a matter of law. The trial court stated at the hearing on the motion for fees and costs:

> "With respect to the motion to award attorneys fees, the Court finds that there is not a basis for awarding attorneys fees. In light of the verdict, in light of the state of the law, the motion to award attorneys fees is denied."

[RT 3/5/92, 27:20-24].

Thus, Tom West received no part of his $5,000 judgment, no attorney's fees, and no costs, and must pay County's costs!

Mr. West filed a timely notice of appeal on March 17, 1992. [A.A. 225-227].

On April 11, 1994, the California Court of Appeal for the Fifth Appellate

District rendered its opinion in this case.

The Court of Appeal affirmed the judgment of the trial court as to the denial of attorney's fees and costs. It found that Mr. West was not entitled to attorney's fees or costs. The court regarded the holdings in Maher, Seals, and Carreras as distinguishable from the case at bar, because in those cases, "the plaintiff obtained substantive relief by showing injury from some official governmental policy." [A-20]. The court found that factor lacking in the instant case, stating: "Appellant has not established that Cronin's conduct was caused by any policy or custom of County." [A-21]. (Mr. West's Monell Claim against the County was severed from the trial against

the deputies, and the trial court denied his motion to adjudicate that claim.)

The Court of Appeal stated:

> "Our analysis leads us to conclude that appellant's claim to fees was dependent upon a favorable adjudication of his Monell claim." [A-22].

The court found that the Monell claim was not proven. [A-21,22].

The Court of Appeal also determined that Mr. West's claim against Cronin and his untried claim against the County were not based on a common nucleus of operative fact, because the latter sought greater damages and required more evidence. [A-19,20].

Finally, the Court of Appeal found that the trial court had properly excer-

cised its discretion in denying attorney's fees, because the request was excessive, and Mr. West had rejected an offer of compromise of $50,000. [A-25-28].[9]

Petitioner filed his Petition for Review with the California Supreme Court an May 23, 1994. On June 29, 1994, the Petition was denied without a written opinion. [B-1].

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9 The opinion of the Court of Appeal also discussed the issue of the verdict form, which required the jury to determine which blows were struck by Dixon and which blows were struck by Cronin. This issue was raised in the trial court and before the Court of Appeal, but is not raised in this Petition.

REASONS FOR GRANTING THE WRIT

A. THE CALIFORNIA COURT OF APPEAL HAS DECIDED A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.

This very important case is the prototypical civil rights action which represents the next step in this Court's development of Sections 1983 and 1988.

It is the typical brutal beating of a lone arrestee by two deputy sheriffs; the very circumstances which gave rise to the Fourteenth Amendment and the civil rights statutes.

What distinguishes the case factually is that the deputy who was found liable

was not a party defendant when the case came to trial.[10] This Court should now state, unequivocally, that for purposes of interpreting the congressional intent behind the Attorney's Fees Award Act of 1976 (42 U.S.C. section 1988), this is a distinction without a difference. The fact that Cronin's non-party status meant that he could be found liable for

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10 Cronin had come forward early in the proceedings, stating that he and Dixon had lied in their police report, that they had beaten Mr. West without cause, and that Mr. West had not struck them as they originally had said. He testified that they had shoved Mr. West's face into the cement while he was handcuffed and while they were both on top of him, and jabbed him in the face with a baton. He said that he decided not to participate in this kind of behavior any more. It would appear that this kind of candor on the part of a law enforcement officer is to be encouraged, and that a remorseful officer should not have to be sued for a civil rights litigant to retain all of his rights under sections 1983 and 1988. The transcript of Cronin's testimony was not reproduced on appeal, as it is not dispositive of the issues raised. It was, however, discussed in the motion for fees and costs, which is part of the record on appeal. [A.A. 147].

battery but not for a constitutional violation must not deprive this petitioner of his right to attorney's fees and costs when he has prevailed in the trial court with a $5,000 judgment in recompense for the beating he received at the hands of the deputies. This is clearly a civil rights case, with pendent state claims, which is typical, as well as a Monell Claim raising constitutional allegations against the County. The trial court did not reach those constitutional claims, which is in keeping with courts' reluctance to do so whenever possible. Under these circumstances, pursuant to this Court's teaching in Maher v. Gagne, 448 U.S. 122 (1980) and Smith v. Robinson, 468 U.S. (1984), Tom West must be declared to be the prevailing party, and must not be deprived of the proceeds of his judgment

or of his right to recover his attorney's fees and costs.

By granting this Petition, this Court will have the opportunity to refine and amplify civil rights law since Maher and Smith, and to make it clear that form will not be exalted over substance in ensuring that Congress' intent to provide representation to all whose rights have been violated is not subverted.

The following points need to be delineated:

a) It is irrelevant why the trial court did not reach the constitutional question, or whether that decision was correct. It is required only that the constitutional claim not be frivolous, and that it arise out of a common nucleus of operative fact with the non-fee gener-

ating claim upon which the plaintiff prevailed. United Mineworkers v. Gibbs, 383 U.S. 715 (1966); Hagans v. Lavine, 415 U.S. 528 (1974). Neither the respondents, nor the trial court ever questioned the substantiality of petitioner's Monell Claim.[11]

b) "Common nucleus of operative fact" refers to the common factual basis upon which the case is based, or upon which the plaintiff prevailed - here, the beating. It does not mean that the constitutional claim and the state claim require identical evidence, or that they

11 The California Court of Appeal not only questioned its substantiality; it held that it had to be proven in order for Mr. West to be entitled to fees and costs! [A-22]. But the trial court precluded Mr. West from going forward on that claim. "Catch-22" takes on new meaning. Of course this is the whole point of this Court's holdings in Maher and Smith. Petitioner did not, and does not raise on appeal the issue of the correctness of the trial court's denial of his motion to proceed on the Monell Claim. The con-

are identical causes of action with simply different labels, giving rise to exactly the same damages. [A-19,20].[12] It means, in the case at bench, that both the Monell Claim and the battery cause of action grew out of the fact that Tom West was brutally beaten by Deputies Dixon and Cronin on August 17, 1986.

c) Where a civil rights plaintiff succeeds on a non-fee-generating claim, and the constitutional claim is not reached, he is the prevailing party for purposes of Section 1988, whether or not his successful claim struck down some governmental regulation, policy or

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constitutional claim against the County was part of the lawsuit, and the motion was made to pursue it, and was never reached. That is all that is relevant to justify fees and costs under Section 1988.

12 This too appears to be a creative assist by the Court of Appeal to the trial court. Nowhere below, either by respondents or by the judge, was the "common nucleus" argument raised.

statute.[13] The whole point of this Court's rulings in Maher[14] and Smith[15] and their progeny in the Court of Appeals, such as Carreras[16] and Seals[17], is that a civil rights plaintiff who succeeds on the principal reason for going to court (i.e. recovery of damages for an unlawful beating in the course of an arrest) is the prevailing party for purposes of fees and costs under Section 1988 even when the

13 **Again, the Court of Appeal opinion raises a** defense never asserted below by either the respondents or the court. It opines that Maher v. Gagne, 448 U.S. 122 (1980), Seals v. Quarterly County Court, 562 F.2d 394 (6th Cir. 1977), and Carreras v. City of Anaheim, 768 F.2d 1039, are distinguishable from the instant case because in those cases, the "plaintiff obtained substantive relief by showing injury from some official governmental policy". [A-20,21]. This is a false distinction. None of those cases confined its ruling to such a narrow circumstance. The point in each was that the plaintiff obtained his essential relief under a state claim without reaching the constitutional claim, and that was sufficient for Section 1988 fees and costs.

14 Maher v. Gagne, 448 U.S. 122 (1980).

15 Smith v. Robinson, 468 U.S. 992 (1984).

16 Carreras v. City of Anaheim, 768 F.2d 1039

cause of action on which he succeeds is a state claim, where the constitutional claim was not reached and was a non-frivolous claim. In any event, this argument was not raised below, and even if it had merit, which it does not, respondents are precluded from raising it on appeal. In its opinion, the Court of Appeal states:

> " . . . it is not our function to raise issues not advanced by the parties." [A-23].[18]

(9th Cir. 1985).

17 Seals v. Quarterly County Court, etc., 562 F.2d (6th Cir. 1977)

18 Despite the fact that Emerson wrote,

Even assuming, arguendo, that a governmental injury is required, it would appear that being clubbed into total disability by a sheriff would qualify. This certainly has the appearance of a policy, and the fact that Dixon was found not liable could mean simply that it did not take two of them to effectuate the policy. [A-22, fn 6].

d) Once a civil rights plaintiff achieves the status of prevailing party by obtaining a judgment based on the acts of one officer, his judgment, attorney's fees and costs are not offset by the County's costs of defense simply because another officer was found not liable.

"A foolish consistency is the hobgoblin of little minds, adored by little statesmen and philosophers and divines", it would appear that where appellate opinions are concerned, it is a plus.

Because of the peculiar facts of this case, with Dixon found not liable for a constitutional violation, Cronin not a party but found liable for battery, with the County assuming liability, and the Monell claim not reached, this needs to be restated, though it is clearly now blackletter law. See Hensley v. Eckerhart, 461 U.S. 424, 440; City of Riverside v. Rivera, 477 U.S. 561; Mary Beth G. v. City of Chicago, 723 F.2d 1263 (7th Cir. 1983); Corder v. Gates, 947 F.2d. 374 (9th Cir. 1991).

The County lost this case; petitioner was the prevailing party; and the finding of one officer's liability is enough.

This Court spoke clearly in Hensley:

> "[w]here a lawsuit consists of related claims, a plaintiff who has won

> "substantial relief should not have his attorney's fees reduced simply because the district court did not adopt each contention raised." Hensley, supra, 461 U.S. at 440.

While this specific discussion concerned construction and modification of the lodestar for calculating the attorney's fees, by definition, subsumed within the holding is the understanding that there certainly is no payment to the governmental entity for costs incurred in defending the officers who were found not liable.

In Rivera, this Court upheld an attorney's fee award of $245,456 in a Section 1983 case in which the plaintiffs prevailed against only six of thirty-two defendants for a judgment of only $33,350.

And of course the underlying precept in Maher and Smith, supra, is that a plaintiff achieves the status of prevailing party when he succeeds on a pendent state claim where a constitutional claim, growing out of the same nucleus of operative fact, is not reached; and, as the prevailing party, is entitled to his rights under Section 1988 to attorney's fees and costs.

In discussing the broad grant of authority to courts to award attorney's fees to plaintiffs seeking to vindicate federal constitutional and statutory rights, this Court stated in Smith v. Robinson:

> "Congress did not intend to have that authority extinguished by the fact that the case was settled or resolved on a nonconstitutional

"ground. Maher v. Gagne, 448 U.S., at 132." Id., at 1006.

The Court in Smith further held: "Congress' purpose in authorizing a fee award for an unaddressed constitutional claim was to avoid penalizing a litigant for the fact that courts are properly reluctant to resolve constitutional questions if a nonconstitutional claim is dispositive. H.R. Rep. No. 94-1558, at 4, n.7. That purpose does not alter the requirement that a claim for which fees are awarded be reasonably related to the plaintiff's ultimate success. It simply authorizes a district court to assume that the plaintiff has prevailed on his fee-generating claim and to award fees appropriate to

"that success." Id., at 1007.

In the case at bar, Mr. West's entire judgment of $5,000, plus all of his costs, in the sum of $6,552.59, were obliterated by the trial court's award to Dixon (and therefore to County) of a costs award in the sum of $28,370.80! [RT 3/5/92, 7:24-26]. The trial court stated:

> "With respect to the notion to Tax Costs, the Court does find that defendant Dixon was the prevailing party. The Court also finds that the County may recover the costs incurred in the defense of Dixon under the theories contended by the County. And the Court finds that the other costs of the County are properly recoverable. The Motion to Tax Costs is denied."

[RT 3/5/92, 27:1-7].

And since the trial court found Dixon to be the prevailing party, as a matter of law it awarded no attorney's fees at all. This is not the law.

These four points are the principal reasons why this Honorable Court should grant this Petition for a Writ of Certiorari, hear this case, and rectify a serious wrong that has occurred here in the civil rights arena in California.

In clarifying the law interpreting Title 42, Section 1983 and 1988, this Court will strengthen its holdings in Maher v. Gagne and Smith v. Robinson, thus ensuring that neither state law nor technicalities of pleading can undermine the intent of Congress that all litigants be afforded counsel when their civil rights are violated.

For Floyd Thomas West to have won a $5,000 judgment in recompense for a brutal beating by law enforcement officers and then to receive no part of that judgment; for his lawyers to go incompensated for more than five hundred hours of legal work over a five and one-half-year period; and for none of his costs amounting to over six-thousand dollars to be paid, makes a mockery of the civil rights statutes and of this Court's rulings in furtherance of them.

The trial court made no finding that any aspect of Petitioner's motion for fees and costs was improper. Nor did any of the respondents suggest at any time that it was excessive. It was objected to and denied based upon the erroneous view that because the County's liability was

based upon a battery, attorney's fees could not be awarded, and costs were precluded by state law, since federal law did not apply.

And yet, the Court of Appeal of the State of California, Fifth Appellate District, in the absence of any finding below of impropriety or excessiveness, gratuitously states that the trial court did not abuse its "discretion" in denying fees because plaintiff did not accept an offer of compromise that did not equal even his costs and fees, and because his judgment was for only $5,000. Therefore, no fees at all is proper, citing cases of outrageous fee applications having no similarity at all to the instant case. [A-25-28].

The opinion of the Court of Appeal

must not stand as the final adjudication of this case.

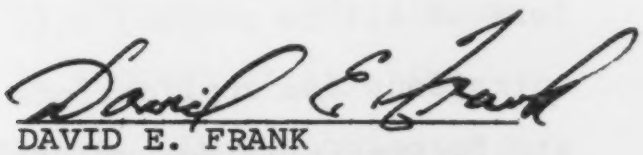
CONCLUSION

The Petition for Writ of Certiorari should be granted because the Court of Appeal of the State of California, Fifth Appellate District, has decided a federal question in a way that conflicts with applicable decisions of this Court.

DATED: September 23, 1994.

Respectfully submitted,

DAVID E. FRANK
A Professional Law Corporation

By: 
DAVID E. FRANK
Attorney for Petitioner
FLOYD THOMAS WEST

APPENDIX A

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

FLOYD THOMAS WEST,	)	F017526
	)	
Plaintiff and Appellant,	)	(Super.Ct. No. 199542)
	)	
v.	)	
	)	
COUNTY OF KERN, et al.,	)	OPINION
	)	
	)	
Defendants and Respondents.	)	
	)	
	)	

APPEAL from a judgment of the Superior Court of Kern County, Kenneth C. Twisselman II, Judge.

David E. Frank for Plaintiff and Appellant.

B.C. Barmann, County Counsel, James H. Thebeau, Deputy County Counsel, Robinson, Palmer & Stanton and William D. Palmer for Defendants and Respondents.

-ooOoo-

Having recovered judgment for $5,000 against the County of Kern (County) based on a battery committed by a nonparty deputy sheriff, appellant Floyd Thomas West claims he is entitled to an award of attorney fees and expenses of more than $200,000 under federal civil rights enforcement statutes (42 U.S.C.[1] sections 1983, 1988). He further claims the trial court erred by denying his request for insertion of additional questions in the special verdict form submitted to the jury. We will conclude that neither claim has merit and will affirm.

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1 Unless otherwise indicated, all statutory references are to 42 United States Code.

FACTUAL AND PROCEDURAL BACKGROUND

Because of the skeletal appellate record [2], we are unable to provide a detailed statement of facts. Such a statement appears unnecessary, in any event, given the limited issues raised on appeal.

Appellant filed a complaint in Kern County Superior Court against County, Roger Dixon, Francis Kevin Cronin and 50 Does. The complaint sought damages, including exemplary damages, prejudgment interest, attorney fees and costs of

---

2 Appellant has not provided a reporter's transcript of the trial. The appellate record consists of appellant's appendix in lieu of clerk's transcript pursuant to California Rules of Court, rule 5.1, reporters' transcripts of some brief, nonevidentiary proceedings, and a settled statement. One of the reporter's transcripts reports discussions between the court and counsel shortly before, during, and immediately after the jury's deliberations. The second reports the hearing on appellant's post-

suit. Appellant alleges that on or about August 17, 1986, Dixon and Cronin, who were then on-duty deputy sheriffs employed by County, arrested appellant in Bakersfield and moved him to the Kern Medical Center, and that in doing so they committed several tortious acts, including physical assault and battery, without provocation and just cause. The complaint also alleged that the defendants "established and adhered to a de facto policy" of County that the alleged improprieties should occur, and that all of the acts complained of constituted not only violations of state tort law, but a denial of appellant's federal constitutional rights protected by the Fourth and Fourteenth Amendments.

---

trial motions. The settled statement is limited to support appellant's contention that he requested inclusion of additional questions in the special verdict form.

Approximately three and one-half years after the action was commenced, appellant filed a written request that the action be dismissed as to Cronin.[3] Apparently County and Dixon were the only defendants remaining in the case.

Shortly before trial, County moved for an order severing appellant's "Monell"[4] claim against County from all other claims. Despite appellant's opposition, the motion was granted, and the

---

3 In his opening brief, appellant asserts that the dismissal resulted from the failure to serve Cronin with the summons and complaint within three years after the action was filed. There is no record support for this statement.

4 In Monell v. New York City Dept. of Social Services (1978) 436 U.S. 658, the United States Supreme Court held that a local government is liable, under section 1983, "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury" depriving a person of federal constitutional rights, privileges, or immunities. (Id. at p. 694.) In other words,

court ordered a separate trial for the Monell claim.

On October 29, 1991, County and Dixon made a written offer, pursuant to Code of Civil Procedure section 998, to allow judgment against them to be taken for $50,000, "to include costs and attorney's fees." Apparently appellant did not accept the offer.

The action proceeded to a jury trial on the non-Monell claims. The jury returned a special verdict which, so far as relevant, provided:

"Question No. 1: Did the defendant, Roger Dixon, use unconstitutional force in the arrest of plaintiff?

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liability of the local government in such cases rests not on the doctrine of respondeat superior but on proof that some official policy caused a government employee to violate another's constitutional rights. (Id. at p. 692.)

"Answer 'yes' or 'no'.

"Answer: Yes____ No X

"Question No. 2: Did the defendant, Roger Dixon, commit a battery upon the plaintiff?

"Answer 'yes" or 'no'.

"Answer: Yes ____ No X

"Question No. 3: Did Francis Kevin Cronin commit a battery upon the plaintiff?

"Answer 'Yes' or 'No'.

"Answer: Yes X No ____

"Question No. 4: Did the defendant, Roger Dixon, falsely imprison plaintiff?

"Answer 'yes' or 'no'.

"Answer: Yes ____ No X

"Question No. 5: Did Francis Kevin Cronin falsely imprison plaintiff?

"Answer 'yes' or 'no'.

"Answer: Yes ____ No X

" . . . . . .

"Question No. 8: What are the total amount of damages suffered by the plaintiff as a result of the battery?

"Answer: $5,000.00

" . . . . . .

"Question No. 10: If you have awarded any damages in response to question 7, 8, or 9, please state the total amount of damages you intend to award to the plaintiff

"Answer: $5,000.00

" . . . . . ."

Following rendition of the verdict, counsel for appellant and County stipulated that Cronin was acting within the course and scope of his employment. Judgment on the verdict was entered on January 22, 1992. The judgment awarded

appellant $5,000 plus costs, against County, and awarded Dixon his costs against appellant, all "subject to the provisions of Section 998 CCP, if applicable."

The entry of judgment produced a flurry of activity. Dixon filed a memorandum of costs totaling $3,364.80. County did likewise with an itemization totaling $28,370.80. County's memorandum relied on Code of Civil Procedure sections 998, 1033, subdivision (a), and 1033.5. Appellant moved to tax Dixon's costs on the grounds they were not personally incurred and paid by Dixon. He also moved to tax County's costs on the grounds that he was the prevailing party, he was entitled to an award of attorney's fees under federal civil rights statutes,

and that the amount of his judgment, including attorney's fees, was more favorable than County's offer of compromise, so County was not entitled to costs under Code of Civil Procedure section 998.

Appellant filed two additional motions. The first sought an order setting a date for trial of appellant's Monell claim, which had previously been severed. In the other motion appellant sought an award of attorney's fees and expenses, in the amount of $202,799.09, pursuant to section 1988.

Dixon and County opposed all of appellant's motions. The motions were heard and denied on March 5, 1992. The court found that Dixon was a prevailing party entitled to recover costs, and County, as the party actually paying those costs, properly included them in its cost

bill. The court further found that since it was denying appellant's request for attorney's fees, County's offer of compromise was above the verdict in appellant's favor, so County was entitled to recover its own costs under Code of Civil Procedure section 998.

Appellant filed a timely appeal from the entire judgment and from the post-judgment orders denying his various motions.

DISCUSSION

1. Appellant Was Not Entitled to an Award of Attorney's Fees.

Appellant argues that because he obtained a favorable verdict in an action involving claimed violations of his constitutional rights, he is entitled to an award of reasonable attorney fees and expenses under applicable federal law. He

relies on section 1988(b), which, in pertinent part, provides:

> "In any action or proceeding to enforce a provision of section [] ... 1983 ... of this title, ... the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." (Emphasis added.)[5]

Appellant's complaint alleged civil rights violations against the individual defendants and County. When the case went to trial, however, Dixon was the

5 Actions based on section 1983, alleging a violation of federal constitutional rights, may be maintained in state courts. (Martinez v. California (1980) 444 U.S. 277.) The fee provision of section 1988 "is part of the section 1983 remedy whether the action is brought in federal or state court." (Maine v. Thiboutot 448 U.S. 1, 11.)

only remaining individual defendant, and the jury expressly found that he did not use unconstitutional force when arresting appellant. Although the jury found that Cronin committed a battery upon appellant, it was not asked to and did not decide that Cronin's conduct was caused by any policy or custom of County. Appellant's Monell claim against County raised that issue, but it was never reached because of the court's order of severance and its posttrial order denying the motion to set a trial date on the Monell claim. Thus, there is no express finding, by the jury or the court, that appellant's federal constitutional rights were violated.

Notwithstanding the absence of such an express finding, appellant claims he is entitled to attorney's fees. He relies

on a line of cases holding that under some circumstances a plaintiff obtaining relief in a civil rights action may recover attorney fees even though the federal constitutional claims were not adjudicated. The principal case so holding is Maher v. Gagne (1980) 448 U.S. 122.

In Maher the plaintiff was receiving benefits from Connecticut's Aid to Families with Dependent Children (AFDC), a federally funded public assistance program. She sued the administrator of the state program, alleging that the state's regulations concerning recipients' credits for work-related expenses improperly reduced the level of her benefits, in violation of federal statutory and constitutional provisions. Before trial the case was settled through entry of a consent

decree which provided for a substantial increase in the standard allowances for work-related expenses and gave AFDC recipients the right to prove their actual work-related expenses exceeded the standard. After the consent decree was entered, the trial court awarded the plaintiff's counsel a fee of $3,012.19. "The [trial] court held that respondent was the 'prevailing party' within the meaning of section 1988 because, while not prevailing 'in every particular', she had won 'substantially all of the relief originally sought in her complaint' in the consent decree." (448 U.S. at p.127.)

On certiorari, the Supreme Court affirmed. The court held that section 1988 does not require full litigation of the issues or a judicial determination

that the plaintiff's rights have been violated. (Maher v. Gagne, supra, 448 U.S. at p. 129.) The trial court's finding that the plaintiff in Maher was the prevailing party "was based on its familiarity with the progress of the litigation through the pleading, discovery, and settlement negotiation stages" and the Supreme Court saw no reason to question its validity. (Id. at p. 130.)

Similar holding were reached in Seals v. Quarterly County Court, etc. (6th Cir. 1977) 562 F.2d 390 and Carreras v. City of Anaheim (9th Cir. 1985) 768 F.2d 1039. In each of those cases the plaintiff obtained relief on state constitutional grounds as an alternative to federal constitutional bases asserted by the plaintiff. In each case the appellate

court expressly relied on the "long-stated preference in the federal courts for avoiding federal constitutional adjudication when valid state law grounds for decision are available." (Seals, supra, 562 F.2d at p. 392; Carreras, supra, 768 F.2d at pp. 1042-1043.) The Carreras court, citing Maher v. Gagne, supra, stated that "[w]hen the plaintiff in a civil rights action prevails on a pendent state claim based on a common nucleus of operative fact with a substantial federal claim, fees may be awarded under section 1988." (768 F.2d at p. 1050.)

Appellant also cites Smith v. Robinson (1984) 468 U.S. 992, and quotes selected language from the opinion. In Smith, however, the Supreme Court held that plaintiff, who had prevailed on a claim under a federal statute which does

not provide for attorney's fees, were not entitled to an award under section 1988 even though they had alleged section 1983 claims which were not reached. The Court stated its holding:

> "We conclude that where, as here, petitioners have presented distinctly different claims for different relief, based on different facts and legal theories, and have prevailed only on a nonfee claim, they are not entitled to a fee award simply because the other claim was a constitutional claim that could be asserted through section 1983..." (468 U.S. at p. 1015.)"

In our opinion the instant case is governed by the holding in Smith v. Robinson, supra, rather than those in

Maher, Seals, and Carreras. Appellant's claims against County rested on two separate, and quite different, foundations. The first, on which appellant prevailed, was that County, as Cronin's employer, was responsible for the battery committed by Cronin while acting in the course and scope of his employment. The second, which was never adjudicated, was that Cronin's conduct was engaged in pursuant to an official policy or custom of County. The second claim obviously requires evidence of facts (existence of a County policy or custom causing Cronin's conduct) unnecessary for recovery on the first claim. Thus, we cannot say that appellant's two claims were based on a "common nucleus of operative fact."

While appellant sought the same type

of relief (damages) for each of his claims against County, the scope of relief was not necessarily the same. In fact, in his motion requesting the court to set his Monell claim for trial, appellant expressly argued that he was not limited to the amount of damages awarded by the jury in the first trial.

There is an important factor differentiating this case from Maher, Seals, and Carreras. In each of those cases the plaintiff obtained substantive relief by showing injury from some official governmental policy. In Maher, the plaintiff was unsuccessful in attacking the state's AFDC regulations. In Seals, the plaintiff established that a countywide plan "'minimizes and cancels out the voting strength of black citizens, denies them effective representation on the Quarterly County

Court and discourages them from voting.'" (562 F.2d at p. 392.) And in Carreras, the plaintiffs showed that a city's solicitation ordinance violated various state constitutional provisions. That factor is lacking here. Appellant has not established that Cronin's conduct was caused by any policy or custom of County.

In essence, appellant asks us to assume that just because he showed that one deputy sheriff, on one occasion, committed a battery while effecting an arrest, therefore County had some official policy or custom requiring or encouraging such conduct. We will not indulge that assumption, particularly when appellant has not provided a record of the evidence on which the jury reached its

conclusions.[6] For all that appears in this record, it is entirely possible that if appellant's Monell claim had been adjudicated, County would have prevailed, in which case appellant would not have been entitled to attorney fees.

Our analysis leads us to conclude that appellant's claim to fees was dependant upon a favorable adjudication of his Monell claim. That adjudication was foreclosed through the joint effect of the pretrial order of severance and the post-

6 In his briefs appellant asserts that Dixon and Cronin were "involved in the same acts, at the same place, and at the same time." The jury, however, drew a sharp distinction between the conduct of the two, expressly finding that Dixon had not used any unconstitutional force and had not battered or falsely imprisoned appellant, but that Cronin did commit battery. Given the dichotomy in the jury's findings, it is clear that both of the officers could not have been following County's official policy or custom. The more reasonable inference is that Dixon, not Cronin, adhered to policy in effecting the arrest.

trial order denying the motion to set the Monell claim for trial. We will not review the correctness of those orders, however, for two reasons. First, appellant has not argued on appeal that the trial court erred in making either order, and it is not our function to raise issues not advanced by the parties.

Second, in the trial court appellant never argued that his attorney fees claim depended on a favorable adjudication of the Monell claim. In fact, he expressly argued to the contrary. Appellant argued that his judgment against County, based solely on the finding that Cronin battered him while in the course and scope of employment, constituted him a prevailing party entitled to fees under section 1988. In his points and authorities sup-

porting his motion for attorney fees appellant stated:

> "[I]t is not necessary that the Monell claim be litigated successfully, or that it be litigated at all, in order for plaintiff to recover attorney's fees now that the trial against the officers has been concluded successfully in plaintiff's favor. In authorizing fee awards to parties who prevail on non-fee claims, Congress wanted courts to award fees to prevailing plaintiffs without being forced to reach consitutional issues."

Having expressly argued below that trial of the Monell claim was unnecessary for adjudication of his right to attorney's

fees, appellant is estopped from taking a contrary position on appeal. (Hensley v. Hensley (1987) 190 Cal.App.3d 895, 899-900; 9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, sections 301, 302, pp. 313-314.)

Even if appellant were entitled to "prevailing party" status, there is yet another basis upon which we would refuse to upset the trial court's order denying fees "in its discretion." Federal courts interpreting that statute have concluded that in exercising its discretion the trial court may deny fees entirely in appropriate circumstances. Such denial was upheld, for example, in Brown v. Stackler (7th Cir. 1980) 612 F.2d 1057, in which the fee claim was described as obviously inflated to an intolerable

degree" (id at p. 1059) and in Vocca v. Playboy Hotel of Chicago, Inc. (7th Cir. 1982) 686 F.2d 605, in which the prevailing party's counsel had unreasonably refused to settle the case before trial and submitted an inadequate fee petition.

The California Supreme Court has expressly recognized this principle:

> "...A fee request that appears unreasonably inflated is a special circumstance permitting the trial court to reduce the award or deny one altogether. 'If ... the Court were required to award a reasonable fee when an outrageously unreasonable one has been asked for, claimants would be encouraged to make unreasonable demands, knowing that the only unfavorable consequence

> of such misconduct would be reduction of their fee to what they should have asked in the first place. To discourage such greed, a severer reaction is needful ...' (Brown v. Stackler (7th Cir. 1980) 612 F.2d 1057, 1059.)" (Serrano v. Unruh (1982) 32 Cal.3d 621, 635, fn. omitted.)

In this case appellant sought a total fee award of $202,799.09. The requested amount was calculated by first determining a "lodestar" figure based on the hours of work devoted by appellant's counsel to the case. Appellant's claimed lodestar was $96,250. Appellant then sought to enhance the lodestar with a 2.0 multiplier based on various factors recognized in cases relied on by appellant.

Appellant further requested reimbursement of $6,552.59 in costs and expenses itemized in his moving papers. Finally, appellant requested an award of $3,850 for service rendered in preparing the fee motion.

The reasonableness of this request must be measured against the reality that appellant did not accept a pretrial settlement offer of $50,000, proceeded to trial, and ultimately established that his claim was worth only $5,000. On this record we cannot say that the trial court abused its discretion in denying what, at least on its face, appears to be an unreasonably inflated fee claim.[7]

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7 Appellant also argues the trial court erred by relying on Code of Civil Procedure sections 998 and 1033, subdivision (a). His arguments rest on the premise he was the prevailing party

II Denial of Appellant's Request for Special Verdict Questions Does Not Require Reversal.

The appellate record includes a settled statement pursuant to California Rules of Court, rule 7. The following is the statement, in its entirety:

> "On January 17, 1992, after the jury had begun its deliberation, plaintiff, through his counsel, requested of the trial court that two additional questions, phrased in the alternative, be put to the jury as well. They were as follows:
>
> "1. Did either Roger Dixon or Francis Kevin Cronin commit a battery upon the plaintiff? Answer 'Yes' or 'No'.
>
> "2. Did either Roger Dixon or Francis Kevin Cronin commit false imprisonment upon the plaintiff? Answer 'Yes' or 'No'.
>
> "Plaintiff argued that the two questions phrased in the alternative were necessary to afford the plain-

---

entitled to attorney's fees under section 1988. Since we have rejected that premise we need not further consider his subsidiary arguments.

"tiff a full and fair recovery in the event that the jury found that, indeed, the plaintiff was the victim of a battery, or batteries, or of false imprisonment, but was unable to determine which of the officers committed the particular torts in question, though it was known that they occurred and that one of the two officers did the act or acts in question.

"The trial court denied plaintiff's request to put the two additional questions to the jury."

Appellant contends the trial court's denial of his request was prejudicial error. He expands on the argument mentioned in the settled statement. The sole authority cited in support of his contention is Perez v. City of Huntington Park (1992) 7 Cal.App.4th 817.

In Perez the plaintiff sued the City of Huntington Park and several individual police officers claiming that he was struck and injured by one or more officers who responded to a disturbance call. The

plaintiff was unable to identify the specific officer or officers, from among the three or four who were at the scene, who struck him. Following a nonjury trial, the court found that while it could not determine with specificity which of the officers were responsible, it did find that two of them did, in fact, strike the plaintiff. Judgment was entered against the city but not against any individual officer.

On appeal the city argued that it could not be held liable for its employees' acts when the court failed to hold any of the officers liable. The appellate court found the argument unpersuasive because of the unique circumstances in the case. There was no jury verdict implying that the employees did no wrong. The court's findings were not inconsistent.

The court found that two of the city's employees, acting in the scope of employment, committed tortious acts injuring the plaintiff. It was only because those employees could not be specifically identified that no individual was held liable. (7Cal.App.4th at p. 821.)

Appellant argues that here the jury might have concluded he was injured by some wrongful act of either Dixon or Cronin, without being able to identify the specific officer responsible, and he should have been allowed to express that conclusion in the special verdict form. We reject the argument for two reasons.

First, it is apparent the jury was able to distinguish betwen the conduct of Dixon and that of Cronin, at least to some extent. The jury expressly found that Dixon did not commit a battery upon

appellant, but Cronin did.

The second, more dispositive reason for rejecting appellant's contention is that there is simply no basis for concluding that the evidence warranted submitting the requested questions to the jury. So far as we can see the questions would be appropriate only in a case, such as Perez, where the evidence reflected some doubt or confusion as to which individual defendant may have committed some specific act. Without a reporter's transcript of the testimony, however, we cannot presume a state of evidence merely to support appellant's claim of error. (See 9 Witkin, Cal.Procedure, op. cit. supra, sec. 250, p. 256.)

DISPOSITION

Judgment affirmed. Costs to

respondents.

Thaxter, J.

WE CONCUR:

Dibiaso, Acting P.J.

Buckley, J.

APPENDIX A

Fifth Appellate District No. F017526

S040006

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

IN BANK

FLOYD THOMAS WEST, Appellant

v.

COUNTY OF KERN Et Al., Respondents

Petition for review DENIED.

SUPREME COURT
FILED
JUN 29, 1994
Robert Wandruff Clerk
DEPUTY
LUCAS

Chief Justice

APPENDIX C

42 U.S.C., Section 1983 - Civil Action for Deprivation of rights, states as follows"

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Colum-

"bia, shall be considered to be a statute of the District of Columbia."

---

42 U.S.C., Section 1988, Proceedings in vindication of civil rights; attorney's fees, states, in pertinent part, as follows:

" . . . .

In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C. 1681 et seq.], or title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], the court, in its discretion, may

"allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

5th Civil No. F 017526

(CERTIFICATE OF SERVICE BY MAIL - RULE 25 F.R.A.P.)

I, David E. Frank, certify that I am a citizen of the United States, over the age of 18 years, a resident of the County of Los Angeles, and not a party to the within action; that my business address is 1801 Avenue of the Stars, Suite 640, Los Angeles, California 90067; that on the 24th day of September, 1994, I served the within Petition for a Writ of Certiorari to the Court of Appeal of the State of California on the following named parties in said action, by placing a true copy thereof in an envelope addressed to the attorneys of record, the clerk's of the courts, and the appellant as follows:

[SEE ATTACHED SHEET]

Supreme Court of the State of
California
Office of the Clerk
300 S. Spring Street
Room 2752
Los Angeles, Ca. 90013

Kevin A. Swan, Clerk
California Court of Appeal
Fifth Appellate District
2525 Capitol Street
P.O. Box 45013
Fresno, Ca. 93718

Gale s. Enstad, Clerk
Superior Court of Kern County
For: Hon. Kenneth C. Twisselman, II
1415 Truxton Avenue
Bakersfield, Ca. 93301

Office of the County Counsel
James H. Thebeau, Esq.
Deputy County Counsel
1115 Truxton Avenue, 5th floor
Bakersfield, Ca. 93301

William D. Palmer, Esq.
Robinson, Palmer & Stanton
3434 Truxton AVenue, Suite 150
Bakersfield, Ca. 93301

Law Office of Richard H. Long
3200 21st Street, Suite 301
Bakersfield, Ca. 93301

Law Office of Michael J. Webb
1430 Truxton Avenue
Suite 460
Bakersfield, Ca. 93301

Floyd Thomas West
P.O. Box 78205
Bakersfield, Ca. 93383

and then by sealing said envelope and depositing the same, with postage thereon fully prepaid in the United States mail at Los Angeles, California; that there is a delivery service by regular communication by United States mail between the place of mailing and the place so addressed.

I certify under penalty of perjury that the foregoing is true and correct.

Dated at
Los Angeles, California
September 24, 1994.

David E. Frank

DAVID E. FRANK